

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

76-6153

Signed

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

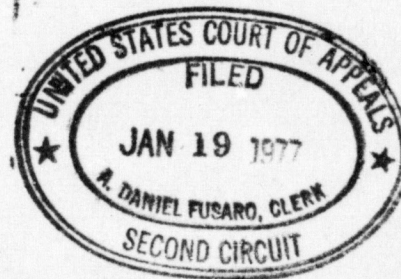
FRANK A. DELORENZO,

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant



ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR THE APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-6153

FRANK A. DELORENZO,

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v.

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Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT
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REPLY BRIEF FOR THE APPELLANT

Our principal brief dealt with the District Court's determination, with which taxpayer agrees (Taxpayer's Br. 3), that the revenue agent who reconstructed taxpayer's taxable wagers erred in his determination of the number of days that taxpayer should be deemed to have accepted wagers. For the reasons expressed in that brief, we believe that this determination clearly is in error. As it is not our purpose to repeat or restate in this reply brief what was said there, we refer to our principal brief for a discussion of this point.

Taxpayer also appears to contend on this appeal that the District Court erred in its finding of taxpayer's daily wagering volume, which was used to project the total amount of taxable wagers placed with taxpayer during the period he was determined to have been engaged in bookmaking. Specifically, taxpayer contends that the wagers recorded on the betting slips taken by the New York State police from a desk drawer in taxpayer's clothing store on the day of his arrest represented wagers placed with an employee of taxpayer's store rather than with taxpayer and, hence, that such wagers were not properly included in taxpayer's daily wagering volume. (Br. 9-11.) The District Court's findings on this point, however, are amply supported by the evidence of record.

At the trial of the instant case before the District Court, the undercover investigator who kept taxpayer under surveillance testified that he observed taxpayer carrying paper bags into his store and leaving the store without the bags. (R. 25-26.) The investigator also testified that on several occasions he saw taxpayer depositing betting slips into these same paper bags. (R. 27-28, 34.) As the District Court found (R. 78), this testimony was sufficient evidence to support the determination that the wagers recorded on the betting slips found in taxpayer's store were placed with taxpayer. Consequently, it correctly held that taxpayer failed to carry his burden of proving that the betting slips did not belong to taxpayer and therefore should have been excluded from his daily wagering volume.

Ignoring the evidence that the District Court considered probative, taxpayer insists (Br. 10) that the employee's plea of guilty to the criminal charge of possessing gambling records that arose out of the police raid on taxpayer's clothing store (see R. 8; Tr. 25-27, 32), and the failure of the police to give taxpayer a receipt for the betting slips seized in the clothing store, when one was issued for the betting slips and cash found on taxpayer's person, establish that the wagers recorded on the betting slips found at the store were placed with the employee rather than taxpayer. There has been no showing, however, that the employee's arrest and conviction was based on the premise that the wagers recorded on the betting slips were placed with him rather than taxpayer. Indeed, the employee's arrest by the police on gambling charges was apparently not based on such a premise inasmuch as the police also determined that the wagers recorded on the betting slips found at the clothing store were placed with taxpayer. (R. 41, 52-57.) Accordingly, neither the fact that the employee was arrested and convicted on criminal gambling charges arising from the police raid, nor the fact that no receipt was issued to the taxpayer for them, is sufficient to establish that the District Court was clearly erroneous in finding that such betting slips were properly included in the computation of taxpayer's daily wagering volume.

The second error alleged by taxpayer is the District Court's finding that the computation of taxpayer's daily wagering volume should include (as determined by the revenue agent) \$802 of

baseball wagers recorded on some of the slips found in taxpayer's clothing store. Taxpayer asserts (Br. 6) that these were wagers on the 1967 World Series, and that these bets should not have been taken into account for the purpose of reconstructing the total amount of wagers placed with taxpayer during the two-month period prior to taxpayer's arrest. While the \$802 in baseball wagers recorded on the betting slips found in taxpayer's clothing store on October 4, 1967 (the day of the police raid) presumably were bets on the 1967 World Series, taxpayer made no showing that he did not accept wagers on regular season baseball games during the prior two-month period. Neither did he establish the amount, if any, by which his daily wagering volume on regular season games was less than \$802. Under these circumstances, taxpayer hardly carried his burden of proving that his daily volume of baseball wagers over the entire two-month period preceding his arrest was less than \$802.

Even if the findings of the District Court against taxpayer were clearly erroneous, either for the reason that the \$802 in baseball bets should not have been included in the computation of taxpayer's daily wagering volume or for the reason that the betting slips found in taxpayer's clothing store did not belong to him, taxpayer's alternative request that this Court dismiss the Government's counterclaim, is not a proper claim for relief on this appeal. Having failed to file a notice of appeal from

the judgment entered below,^{*/} taxpayer is precluded from obtaining any appellate modification in his favor of that judgment, including any such modification of that part of the judgment entered on the Government's counterclaim. See Helvering v. Pfeiffer, 302 U.S. 247, 250-251 (1937); Morley Construction Co. v. Maryland Casualty Co., 300 U.S. 185, 191-192 (1937); 9 Moore's Federal Practice (2d ed.), par. 204.11[3], pp. 932-933.

Respectfully submitted,

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Of Counsel:

JAMES M. SULLIVAN, JR.,
United States Attorney.

JANUARY, 1977.

^{*/} As the judgment was not included in the separately bound record appendix, a copy thereof appears as an appendix to this brief, infra.

CERTIFICATE OF SERVICE

It is hereby certified that service of this reply brief has been made on opposing counsel by mailing four copies thereof on this 4th day of January, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

Davis M. Etkin, Esquire
Etkin and Stark
833 Union Street
Schenectady, New York 12308

Gilbert E. Andrews
GILBERT E. ANDREWS
Attorney.

APPENDIX

JUDGMENT ON DECISION BY THE COURT

CIV 32 (7-63)

United States District Court

FOR THE

NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 71-CV-290

FRANK A. DeLORENZO,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

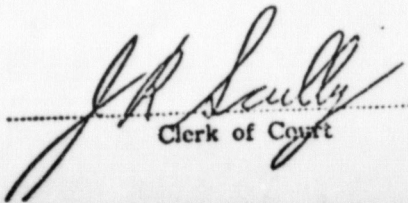
JUDGMENT

This action came on for trial ~~(hearing)~~ before the Court, Honorable James T. Foley
United States District Judge, presiding, and the issues having been duly tried
~~(heard)~~ and a decision having been duly rendered,

It is Ordered and Adjudged that the complaint is dismissed and on the
counterclaim, the defendant is entitled to recover from the plaintiff
the sum of \$2,801.44.

Dated at Utica, New York
of July , 19 76.

, this 9th day


Clerk of Court